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Measures to eliminate international terrorism

Follow-up to the outcome of the Millennium Summit

Identical letters dated 7 November 2012 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General and the President of the Security Council

I have the honour to transmit herewith a letter dated 1 November 2012 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway and Sweden and myself, addressed to the President of the Security Council (see annex), and would like to request that the present letter and its annex be issued as a document of the sixty-seventh session of the General Assembly, under agenda items 105 and 113, and of the Security Council. The document will serve the broad interest of United Nations Member States, as it presents proposals on improving fair and clear procedures for a more effective United Nations sanctions system.

(*Signed*) Paul **Seger**
Ambassador
Permanent Representative

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Annex to the letters dated 7 November 2012 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General and the President of the Security Council

We, the undersigned representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland (the Group of Like-minded States on Targeted Sanctions), are writing to you on the issue of Security Council sanctions.

The members of the Group of Like-minded States on Targeted Sanctions are strongly committed to the effective implementation of the Council's sanctions regimes. We closely follow the developments with regard to the Al-Qaida sanctions regime established pursuant to resolutions 1267 (1999) and 1989 (2011), and commend the Security Council for the important steps that were taken in the past few years for a more independent and effective sanctions review mechanism. We are convinced that by further improving fair and clear procedures, the Security Council will render the work of the Al-Qaida sanctions Committee more effective and legitimate and thus considerably strengthen it as a counter-terrorism instrument. We are also convinced that the benefits of the Ombudsperson process of the 1267/1989 sanctions regime should be extended to other relevant sanctions regimes. The attached paper, entitled "Improving fair and clear procedures for a more effective United Nations sanctions system", spells out our proposals in this regard.

We hope that the Council will find interest in these ideas, in particular in the context of the upcoming consultations and negotiations in preparation for the adoption of a follow-up resolution to resolution 1989 (2011).

We look forward to continuing and deepening the dialogue on this important matter with all members of the Security Council.

(*Signed*) Martin **Sajdik**
Ambassador
Permanent Representative of Austria to the United Nations

(*Signed*) Jan **Grauls**
Ambassador
Permanent Representative of Belgium to the United Nations

(*Signed*) Eduardo **Ulibarri**
Ambassador
Permanent Representative of Costa Rica to the United Nations

(*Signed*) Carsten **Staur**
Ambassador
Permanent Representative of Denmark to the United Nations

(*Signed*) Jarmo **Viinanen**
Ambassador
Permanent Representative of Finland to the United Nations

(*Signed*) Peter **Wittig**
Ambassador
Permanent Representative of Germany to the United Nations

(*Signed*) Christian **Wenaweser**
Ambassador
Permanent Representative of Liechtenstein to the United Nations

(*Signed*) Herman **Schaper**
Ambassador
Permanent Representative of the Kingdom of the Netherlands
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(*Signed*) Geir O. **Pedersen**
Ambassador
Permanent Representative of Norway to the United Nations

(*Signed*) Marten **Grunditz**
Ambassador
Permanent Representative of Sweden to the United Nations

(*Signed*) Paul **Seger**
Ambassador
Permanent Representative of Switzerland to the United Nations

Enclosure

Improving fair and clear procedures for a more effective United Nations sanctions system

Introduction

Targeted sanctions continue to serve as an important tool for the United Nations Security Council in exercising its primary responsibility for the maintenance of international peace and security under Chapter VII of the Charter of the United Nations. In previous years, the Security Council has taken significant steps to enhance fair and clear procedures within the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities. In particular, the establishment and strengthening of the Ombudsperson process by resolutions 1904 (2009) and 1989 (2011) were important steps towards an independent and effective sanctions review mechanism.

Since her appointment on 3 June 2010, Ombudsperson Kimberly Prost has been petitioned with requests for delisting in more than 33 cases. Out of those cases 19 delisting decisions have so far been taken by the Committee, including the recent delisting of Yassin Abdullah Kadi on 5 October 2012. These numbers highlight the important contribution of the Office of the Ombudsperson to making the list of the Al-Qaida sanctions Committee more accurate and more legitimate.

Nonetheless, regional and national legal challenges to the Al-Qaida sanctions regime and its implementation persist. The recent judgment of the European Court of Human Rights in the Nada case, for instance, stated that United Nations sanctions do not prevent judicial review of the domestic implementation of sanctions. However, if domestic lawsuits of such cases indeed lead to national delistings, the uniform application of and full compliance with United Nations sanctions will be at stake. As long as courts and parliaments perceive sanctions procedures as not satisfying the basic elements of rule of law and due process, the implementation of the Al-Qaida sanctions regime will continue to be challenged.

Similar due process concerns exist in the context of other targeted sanctions regimes of the Security Council. The recent United Nations General Assembly High-level Meeting on the Rule of Law encouraged the Security Council to further develop fair and clear procedures without limitation to a particular sanctions regime. The Security Council should therefore start contemplating on how the benefits of the Office of the Ombudsperson could be extended beyond the Al-Qaida sanctions regime to other relevant sanctions committees.

The Group of Like-minded States remains convinced that by further improving fair and clear procedures, the Security Council will render the work of its sanctions regimes more effective and legitimate. It is in this perspective that we invite the Security Council to take into consideration the following common suggestions by the Group of Like-minded States on Targeted Sanctions.

1. Proposals to further enhance fair and clear delisting procedures: strengthening the Ombudsperson process

1.1. Enhanced cooperation of States with the Ombudsperson for information gathering

Member States shall timely provide the Ombudsperson with all relevant information on persons and entities applying for delisting, including confidential and classified information or declassified documents

The Security Council should encourage Member States to conclude confidentiality agreements and arrangements with the Ombudsperson. The Security Council should also urge Member States to abide by the time limits as set forth in annex II of resolution 1989 (2011).

The Ombudsperson should bring cases of specific as well as of persistent non-cooperation of a State to the attention of the Committee and ask for its assistance. In addition, the Ombudsperson should address lack of compliance by Member States in her biannual reports.

The effectiveness of the Ombudsperson's work and her ability to provide detailed information and thorough analysis and observations to assist the Committee hinges upon the cooperation of States. Paragraph 25 of resolution 1989 (2011), which urges Member States to provide all relevant information, has proven useful to encourage States to cooperate with the Ombudsperson. Nonetheless, in a substantial number of cases Member States do not or only belatedly respond to requests for information by the Ombudsperson. The timely provision of relevant information is fundamental to the overall fairness of the process and the Ombudsperson can base her recommendation solely on information available to her.

1.2. Codification of the Ombudsperson practice

The standards for review of delisting requests should be transparent and spelled out in greater detail in the resolution that guides the work of the Ombudsperson. In order to ensure coherence, predictability and continuity, the following principles should be enshrined in the future mandate of the Ombudsperson:

(a) The Ombudsperson can base her recommendation only on information provided or available to her. If no or insufficient information is available, the Ombudsperson shall recommend delisting;

(b) The Ombudsperson should continue to base her recommendations on current and up-to-date information, examining whether the listing is justified as of the day of the examination of the delisting request, which is different from a historical review of the accuracy of the listing on the day of the Committee's decision to create a new list entry. The upcoming resolution should also specify that the comprehensive report shall outline whether sufficient information is available that provides a reasonable and credible basis to assess whether the listing criteria are still fulfilled;

(c) Information obtained under torture or through other illegal means should not be admissible to the process.

Domestic, regional and international courts and tribunals need legal certainty in order to assess whether the Ombudsperson process constitutes an effective remedy for the affected individuals and entities. The Council should therefore clarify the standards according to which the Ombudsperson shall deal with requests for delisting.

1.3. Transparency of the delisting process

1.3.1. Procedural transparency

The Office of the Ombudsperson shall inform the petitioner upon request about the state of play of his or her request for delisting where necessary to ensure the transparency of the process.

Practice has shown that in many instances petitioners approach the Ombudsperson in order to be informed about how their request for delisting is being processed. It is a feature of fairness and would enhance confidence of petitioners in the delisting process, if the Ombudsperson were given explicit powers to inform the persons concerned about the state of play of their requests.

1.3.2. Material transparency

1.3.2.1. Reasoning of Committee decisions

All Committee decisions, regardless of whether they maintain a listing or delist an individual or entity, should contain adequate and substantial reasons. The Ombudsperson shall convey these reasons to the petitioner.

The reasons for delisting and maintaining a list entry in one case may be important in assessing other cases. It is therefore important that the Ombudsperson know about the specific reasons behind a Committee decision. Also, the petitioner must be informed about these reasons, not least in order to be able to change behaviour and to finally be able to successfully request delisting.

1.3.2.2. Publication of a releasable summary of the comprehensive report

A releasable summary of the comprehensive report of the Ombudsperson should be published. Thereby, private and confidential information should be adequately protected.

A releasable summary of the comprehensive report of the Ombudsperson would enhance the transparency of the Ombudsperson process. The publication of the releasable summary is particularly important in cases where the Ombudsperson recommends maintaining a listing since her findings might be essential in relevant national or regional court proceedings.

1.4. Extension of the mandate of the Office of the Ombudsperson

The mandate of the Office of the Ombudsperson should be extended to an unlimited period. The mandate should be reviewed every 18 months.

A prolongation of the mandate of the Office without limitation would give more weight and credibility to the Ombudsperson's work, enhance her independence and solve important administrative hurdles such as the funding of the Office.

Nevertheless, a regular review of the mandate is necessary in order to adjust the Office to new and changing developments.

1.5. Administrative issues

The Office of the Ombudsperson should be timely provided with all resources necessary to fulfil her mandate, including funds for translation and interpretation. The general guidelines as to word limits for translation, applicable to parliamentary documents in the United Nations system, should not be applied to the comprehensive reports of the Ombudsperson.

Translation and interpretation in all relevant languages is an essential feature of due process. Absent sufficient resources and funds for interpretation and translation, the communication between the Ombudsperson and the petitioner can be impeded. In addition, the word limitation infringes on the independence of the Ombudsperson.

1.6. Enlarging the scope of the mandate of the Office of the Ombudsperson

1.6.1. Competence of the Ombudsperson to transmit requests for humanitarian exemptions

The Office of the Ombudsperson should be entitled to transmit requests for humanitarian exemptions by listed individuals or entities to the Committee within two working days. In the absence of a negative decision within three working days, the Committee should authorize such requests and the Ombudsperson should be entitled to notify the decision of the Committee to the petitioner and the State(s) concerned.

Under the current system, the responsibility of advancing an individual's request for humanitarian exemptions lies with the Member States, which may not wish to present exemption requests to the Committee or may lack the resources to do so. In order to guarantee full respect for fundamental rights, individuals and entities themselves should also have the right to petition for an exemption through the Ombudsperson.

1.6.2. Competence of the Ombudsperson to assist persons or entities who are unintendedly affected by the sanctions regime

The Ombudsperson should, when such cases are brought to her attention, have the mandate to assist in monitoring and follow-up on cases of persons or entities who face unintended problems owing to the sanctions regime, such as delisted persons and persons with the same names as listed entries. In particular, the Ombudsperson should have the competence to submit to the consideration of the Committee proposals for documents of negative identification and documents certifying a delisting. Those documents, after approval by the Committee, could then be used by the concerned persons as evidence for not being subject to Security Council sanctions.

In several cases of individuals delisted by the Committee through the Ombudsperson process, the delisted person has approached the Ombudsperson and claimed that he/she is still subject to the application of sanction measures, even after the delisting. The Ombudsperson should assist in such cases.

2. Proposals for more just and effective listings: increasing the transparency of the listing process and introducing time limits to all listings

2.1. Clarification of listing criteria

The Security Council should offer standards of legal clarity as to what amounts to "supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof" and may result in a listing under the 1267/1989 sanctions regime.

Paragraph 4 of resolution 1989 (2011) defines the acts and activities that indicate that an association with Al-Qaida exists. These acts and activities constitute the criteria for listing and are therefore the nucleus of the Al-Qaida sanctions regime. For reasons of legal certainty and predictability those criteria should meet certain standards of legal clarity, not least to allow affected individuals, groups, undertakings or entities to change their behaviour in order to become delisted. Given the broad scope of the term "otherwise supporting acts or activities of Al-Qaida" in paragraph 4 (c) of resolution 1989 (2011), the Council should specify and exemplify possible supporting acts or activities other than recruitment, such as for instance acts of incitement to terrorism.

2.2. Disclosure of designating State

When necessary to the fairness of the process, the Ombudsperson may, upon request, inform the petitioner about the identity of the designating State.

As of now, the identity of the designating State or States is confidential and the Ombudsperson can only disclose the information after seeking and obtaining the consent of the relevant designating State or States (see resolution 1989 (2011), para. 29, urges but does not oblige relevant States to reveal their identity). The non-disclosure of the identity of the designating States remains an impediment to the delivery of effective due process, because the petitioner may face a significant disadvantage in answering a case without knowing the identity of the State or States that proposed the listing. Furthermore, listed individuals and entities will not be able to access the delisting procedure through the designating State if the latter is not known to them.

2.3. Time limits for all listings

The Security Council should require that after the periodic triennial review each listing must be actively confirmed by the Committee in order to remain on the list. Thereby, the Committee should give reasons why a listing remains appropriate.

Introducing a time limit to all listings would underline the preventive and temporary nature of the sanctions measures.

3. Looking beyond the Al-Qaida sanctions Committee: improving due process in other sanctions Committees

3.1. Extension of the mandate of the Ombudsperson to other sanctions regimes

The important procedural safeguards of the Ombudsperson process should be gradually extended to other appropriate sanctions regimes, in particular those with broad criteria for listing. Accordingly, consideration should be given to equip the Office of the Ombudsperson with adequate resources.

Only individuals and entities listed on the Al-Qaida sanctions list currently have access to the Ombudsperson process. Yet, similar due process concerns exist in other United Nations Security Council sanctions regimes. Some of the so-called country-specific sanctions regimes do not in fact target a country or its regime and its policies. Instead, they target persons, groups and entities, in stark and often violent opposition to the internationally recognized Government and its policies. Thus, they do not enjoy the modicum of protection of their rights and interests that a Government with access to diplomatic channels and representation at the United Nations would normally offer. Persons listed under those Security Council sanctions regimes have also started to challenge their listing under legal acts implementing Security Council designations. The Security Council should therefore consider the extension of the competence of the Office of the Ombudsperson to other regimes on the occasion of their next mandate renewals.

3.2. Extension of the "holds-procedure" time limits adopted by the 1267/1989 Committee to other sanctions regimes

The Security Council should direct all sanctions Committees to amend their guidelines to ensure that no matter is left pending before the Committee for a period longer than six months, unless the Committee determines on a case-by-case basis that extraordinary circumstances require additional time for consideration. Accordingly, all sanctions Committees should amend their guidelines following the model of the guidelines of the 1267/1989 Committee.

The right to have cases decided within reasonable time is an essential element of due process. The past practice in the 1267/1989 Committee of placing holds on proposed decisions, some of which were left undecided for years, was successfully put to an end in 2010. Extending time limits for placing holds on proposed decisions to all sanctions Committees would be an important element of due process and would significantly strengthen the fairness and the transparency of decision-making in all sanctions Committees.